

Pursuant to Ind.Appellate Rule 65(D),
this Memorandum Decision shall not be
regarded as precedent or cited before
any court except for the purpose of
establishing the defense of res judicata,
collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

MARK S. LENYO
South Bend, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

CHRISTOPHER A. AMERICANOS
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

ERIC MOTT,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

)
)
)
)
)
)
)
)
)
)
)

No. 71A04-0611-CR-672

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jerome Frese, Judge
Cause No. 71D03-0506-FC-53

June 12, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Eric Mott (“Mott”) appeals his conviction for robbery as a Class B felony. Specifically, he contends that a fatal variance exists between the State’s charging information and the proof at trial because the State alleged that Mott used a semi-automatic handgun during the commission of the robbery when the proof at trial established that Mott used a BB gun. Mott also argues that there is not sufficient evidence to support his conviction of robbery as a Class B felony and that the conviction should have been entered as a Class C felony because there is no evidence in the record identifying the BB gun as a deadly weapon. Concluding that the variance between the charging information and the proof at trial was not fatal and that there is substantial evidence to support his conviction of robbery as a Class B felony, we affirm.

Facts and Procedural History

On June 10, 2005, Jami Brewer (“Brewer”), Pamela Hanyzewski (“Hanyzewski”), and Sherilyn Kubisiak (“Kubisiak”) were working at Key Bank in Lakeville, Indiana. Brewer was working as the manager while Hanyzewski and Kubisiak were working as tellers. All three of them were working behind the counter in adjacent windows with Hanyzewski on the left, Brewer in the middle, and Kubisiak on the right. Brewer was having a conversation with Hanyzewski’s husband, Troy Hanyzewski (“Troy”).

From their location behind the counter, Hanyzewski and Kubisiak observed Mott and an accomplice hastily approaching the bank. The two men, each armed with a gun, entered the bank. According to Brewer, Mott had a black gun in his hand and his accomplice had a black semi-automatic handgun. Mott jumped over the counter, pointed

his gun at Hanyzewski, and demanded the money from her drawer, while his accomplice proceeded to each teller window searching for cash. The accomplice put his gun to the back of Troy's head, ordered him to his knees, and aimed his gun at Hanyzewski. Brewer and Hanyzewski feared that "somebody would be shot." Trial Tr. p. 51. Mott and the accomplice stole over \$1,500.00 in cash from the bank.

After a car chase, Mott and his accomplice were apprehended and their vehicle searched. During the search, Officers Scott Moniz and Lance Anderson found, among other things, money from the bank, two BB guns, several wigs, and a couple of hats. The BB guns were not loaded. An experienced detective who saw one of the guns believed it to be a real firearm.

Mott was charged with robbery as a Class B felony.¹ The charging information read as follows:

On or about the 10th day of June, 2005, in St. Joseph County, State of Indiana, ERIC MOTT did knowingly and while armed with a deadly weapon, to wit: a semi-automatic handgun, take property from or from the presence of Sherri Kubisiak, employee of Key Bank, to-wit: US Currency, by using or by threatening the use of force, to wit: by pulling out a semi-automatic handgun and demanding money.

All of which is contrary to the form of the statute in such cases made and provided, to-wit: Indiana Code 35-42-5-1 and 35-41-2-4, and against the peace and dignity of the State of Indiana.

Appellant's App. p. 14. A jury trial commenced on June 26, 2006. At trial, Mott had full disclosure of the evidence and knew that the weapons seized were BB guns. After the State had presented its case, Mott filed a Motion for Directed Verdict claiming a fatal variance in the State's charging information and the proof at trial. The trial court denied

¹ Ind. Code § 35-42-5-1.

Mott's motion. Mott was convicted as charged and sentenced to twenty years incarceration with six years suspended. This appeal ensued.

Discussion and Decision

On appeal, Mott contends that his conviction for robbery as a Class B felony should be reversed due to a fatal variance between the State's charging information and the proof at trial. Mott also argues that there was insufficient evidence to support his conviction for robbery as a Class B felony.

I. Variance Between Charging Information and Proof at Trial

First, Mott contends that a fatal variance exists between the State's charging information and the proof at trial because the State alleged that Mott used a semi-automatic handgun during the commission of the robbery when the proof at trial established that Mott used a BB gun.

"A variance is an essential difference between proof and pleading." *Mitchem v. State*, 685 N.E.2d 671,677 (Ind. 1997) (quoting *Madison v. State*, 234 Ind. 517, 532, 130 N.E.2d 35, 42 (1955)). "Not all variances between allegations in the charge and the evidence at the trial are fatal." *Id.* The test to ascertain whether a variance between the proof at trial and a charging information or indictment is fatal is as follows:

- (1) was the defendant misled by the variance in the evidence from the allegations and specifications in the charge in the preparation and maintenance of his defense, and was he harmed or prejudiced thereby; [or]
- (2) will the defendant be protected in the future criminal proceeding covering the same event, facts, and evidence against double jeopardy?

Id.

Mott argues that the variance in this case was fatal because the proof at trial establishing that he used a BB gun rather than a semi-automatic handgun during the commission of the robbery affected his theory of defense. Specifically, Mott argues that:

Defending a case where it is alleged that a semi-automatic handgun is used is an entirely different case from one in which it is alleged that a BB gun is used as a deadly weapon. Had the defendant been convinced that the State was going to proceed on the grounds that a BB gun utilizing plastic BBs was a deadly weapon, Defendant could have secured an expert witness who could negate the State's position that a BB gun utilizing plastic BBs is a deadly weapon. Indeed, the State offered no expert testimony to demonstrate that these particular BB guns were deadly weapons. No evidence was presented as to the BB guns' weight, the material they were constructed of, whether the BB guns were operational, whether the BBs themselves could cause serious bodily injury in light of the fact that they were plastic and not metal BBs. Furthermore, the State had conducted no tests to determine whether or not the BB guns in question were even operational.

Appellant's Br. p. 12-13. We cannot agree that the variance was fatal.

The State charged Mott with robbery as a Class B felony. To convict Mott, the State had to prove beyond a reasonable doubt that Mott, while armed with a deadly weapon, knowingly or intentionally took property from the presence of another person (1) by using or threatening the use of force on any person or (2) by putting any person in fear. *See* Ind. Code § 35-42-5-1. The specific deadly weapon used in the commission of a robbery is not an element of the crime.

It is well recognized that "a failure to prove a material allegation descriptive of the offense is fatal." *Mitchem*, 685 N.E.2d at 676 (quoting *Madison*, 234 Ind. at 532, 130 N.E.2d at 42. However, as stated above, the specific weapon used in the commission of a robbery is not an element of the crime. In fact, Indiana's indictment and information statute does not require the State to allege with specificity the instrumentality used in the

charged crime. *See* Ind. Code. § 35-34-1-2; *Mitchem*, 685 N.E.2d at 676. “The general rule of Indiana criminal procedure is that ‘what is unnecessary to allege is automatically unnecessary to prove.’” *Mitchem*, 685 N.E.2d at 676 (quoting *Powell v. State*, 250 Ind. 663, 668, 237 N.E.2d 95, 98 (1968)). “Allegations not essential . . . which can be entirely omitted without affecting the sufficiency of the charge against the defendant, are considered mere surplusage and may be disregarded.” *Id.* “Unnecessary descriptive material in a charge is surplusage. It need not be established in the proof and if there is a variance in the evidence from such unnecessary particularity it does not vitiate the proceedings unless it is shown that the defendant has been misled or prejudiced thereby.” *Id.* (quoting *Madison*, 234 Ind. at 543-44, 130 N.E.2d at 47).

The charging information stated, in part, “ERIC MOTT did knowingly and while armed with a deadly weapon, to wit: a semi-automatic handgun, take property from or from the presence of Sherri Kubisiak” Appellant’s App. p. 14. We agree with the State that the allegation regarding the specific type of weapon was surplusage in this case. If the words “a semi-automatic handgun” had been omitted from the charge, this would not have affected the sufficiency of the charge, nor would the omissions of these words have altered the crime with which Mott was charged. *See Mitchem*, 685 N.E.2d at 676.

Additionally, Mott had full disclosure of the evidence and knew going into the trial that the weapons seized were BB guns. As the trial court aptly stated in reference to the variance in the charging information, “It changes the argument [the State] may make to the jury. It doesn’t change [Mott’s] theory of the case.” Trial Tr. p. 260. Because

Mott was not misled in preparing a defense and was not harmed or prejudiced by this variance, it is not fatal.

In the alternative, Mott argues that the variance in the charging information is fatal because it subjects him to double jeopardy because the federal authorities could still charge him with bank robbery under the federal bank robbery statute. He is incorrect. Under dual sovereignty doctrine, the double jeopardy clause does not bar a defendant's federal conviction after a state conviction for the same conduct. *U.S. v. Robinson*, 42 F.3d 433, 434 (7th Cir. 1994). Thus, two identical offenses are not the same offense for double jeopardy purposes if different sovereigns prosecute them. *Id.*

II. Sufficiency of the Evidence

Mott also contends that there is not sufficient evidence to support his conviction for robbery as a Class B felony and that the conviction should have been entered as a Class C felony because the BB gun was not a deadly weapon. Specifically, he contends that the State's evidence regarding the deadly weapon element was insufficient because there is no evidence in the record indicating the weight of the gun, the material of which it was constructed, or any other specific information identifying it as a deadly weapon capable of causing serious bodily injury. We cannot agree.

When reviewing a challenge to the sufficiency of evidence, we do not reweigh the evidence or judge the credibility of witnesses. *Jones v. State*, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the judgment and the reasonable inferences from that evidence to determine whether a reasonable trier of fact

could conclude the defendant was guilty beyond a reasonable doubt. *Id.* We will uphold the conviction if there is substantial evidence of probative value to support it. *Id.*

As earlier stated, to prove that Mott committed robbery as a Class B felony, the State had to prove beyond a reasonable doubt that Mott, while armed with a deadly weapon, knowingly or intentionally took property from the presence of another person (1) by using or threatening the use of force on any person or (2) by putting any person in fear. *See* Ind. Code § 35-42-5-1. Mott argues that the State failed to prove that the BB gun used here was a deadly weapon. We disagree.

Indiana Code § 35-41-1-8 defines “deadly weapon,” in relevant part, as a loaded or unloaded firearm, or as a destructive device, weapon, taser, equipment, chemical substance, or other material that in the manner it is used, or could ordinarily be used, or is intended to be used, is readily capable of causing serious bodily injury. *See Davis v. State*, 835 N.E.2d 1102, 1112 (Ind. Ct. App. 2005), *trans. denied*. “Serious bodily injury” means “bodily injury that creates a substantial risk of death or that causes serious permanent disfigurement, unconsciousness, extreme pain, permanent or protracted loss, impairment of the function of a bodily member or organ, or loss of a fetus.” Ind. Code § 35-41-1-25.

Whether a weapon is a deadly weapon is determined from a description of the weapon, the manner of its use, and the circumstances of the case. *Davis*, 835 N.E.2d at 1112. “The fact finder may look to whether the weapon had the actual ability to inflict serious injury under the fact situation and whether the defendant had the apparent ability

to injure the victim seriously through use of the object during the crime.” *Id.* (quoting *Merriweather v. State*, 778 N.E.2d 449, 457 (Ind. Ct. App. 2002)).

We have previously held that disabled or inoperable pellet guns are deadly weapons within the meaning of Indiana Code §§ 35-42-5-1 and 35-41-1-8. *See id.*; *Merriweather*, 778 N.E.2d at 458; *Whitfield v. State*, 699 N.E.2d 666, 670 (Ind. Ct. App. 1998), *trans. denied*. A BB gun can be considered a deadly weapon. *Davis*, 835 N.E.2d at 1112. For instance, in *Davis*, a case factually analogous to this case, Davis and Bacon used inoperable BB guns to rob a bank because they knew that people would believe they were real guns and would be sufficiently frightened to cooperate. *Id.* At trial, the evidence established that the tellers believed that Davis and Bacon were armed with real guns, that at least one customer and a police officer mistook the BB gun for a real gun, and that Davis and Bacon used the guns in a threatening manner that frightened the tellers. *Id.* The evidence also established that the BB guns weighed approximately the same as real guns and may be used to bludgeon someone. *Id.* at 1113. As a result, the *Davis* court found the evidence sufficient to support Davis’s conviction for robbery as a Class B felony. *Id.*

In *Merriweather*, the robber held the victim at gunpoint while she emptied a cash drawer. 778 N.E.2d at 458. The victim testified that she was afraid and initially believed that the gun was real. *Id.* As a result, we concluded that the inoperable pellet gun was a deadly weapon with the apparent ability to cause serious bodily injury and was used in a threatening manner, thereby inducing fear in the victim. *Id.* Likewise, in *Whitfield*, the robber stuck a disabled pellet gun in the victim’s face and demanded money, frightening

the victim to such a great extent that he was unable to speak. 699 N.E.2d at 670. The evidence further established that the pellet gun was essentially indistinguishable from the real gun on which it was modeled. *Id.* Ultimately, the *Whitfield* court concluded that because the disabled pellet gun was used in a threatening manner and placed the victims in fear, it was a deadly weapon. *Id.* at 671.

Davis, Merriweather, and Whitfield are dispositive here. The evidence established that Brewer, Hanyzewski, and Kubisiak believed that Mott was armed with a real gun, that an experienced detective who saw one of the guns believed it to be a real firearm, and that Mott used his gun in a threatening manner by pointing it at his victims. Brewer and Hanyzewski feared that “somebody would be shot.” Trial Tr. p. 51. Additionally, Mott’s accomplice put his gun to the back of one of the victims’ head. Although there was no testimony establishing the BB gun’s ability to injure in this case, the jury, based upon their common knowledge and experience, reasonably could have determined that a BB gun could cause serious bodily injury. *See Williams v. State*, 451 N.E.2d 687, 690 (Ind. Ct. App. 1983). The evidence is sufficient to support the jury’s finding that the BB gun used by Mott was readily capable of causing serious bodily injury and was used in a threatening manner causing the victims to experience substantial fear. Thus, the evidence is sufficient to support Mott’s conviction for robbery as a Class B felony.

Affirmed.

SULLIVAN, J., and ROBB, J., concur.

